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Dismantling the Public Sector Pension "Crisis"

by Jourlande Gabriel

I. Introduction

Recently, the relatively dry subject of retirement systems for employees of state and local government has become the focus of increasing attention from the media and policymakers.[1] Given the size and scope of public pension systems, this attention is welcome. According to the U.S. Department of Labor, state and local governments employ 16 million workers, approximately 10 percent of the nation's workforce.[2] These employees provide a broad range of essential public services, such as teaching at and supporting public schools and universities, policing streets, fighting fires, guarding prisons and jails, and protecting public health and the environment. State and local pension systems distribute more than $130 billion annually to over six million retired public workers and beneficiaries,[3] and by the end of September 2005, held assets of $2.66 trillion.[4]

The primary reason public retirement systems are receiving increased scrutiny is growing concern over the fiscal capacity of the public sector — at all levels — to fund promised pension benefits. This concern over fiscal capacity is well-founded. However, misinformation and inaccuracies have dominated the general debate over the cause of the fiscal strains as well as the identification of alternatives for resolving these fiscal issues, much of which stem from frequently repeated suggestions that public sector retirement benefit systems should mirror those in the private sector.

While this line of thinking is superficially appealing to many — if something is good for businesses, why not government — it ignores the substantial differences between the public and private sectors. One fundamental difference involves profit motive. The private sector, appropriately, focuses its decision making on individual profit maximization. All other considerations are secondary, at best. The public sector, however, is focused on the public good. Hence, much of the public sector's provenance, like caring for the impoverished and promoting public safety, is particularly void of anything related to profit maximization.

This in turn leads to a very different relationship between workers and their employers in the private versus public sectors. A private business' relationship with a worker ends immediately and completely upon the termination of that worker's employment. Not so in the public sector. If a former employee of a governmental entity earns post-retirement income that is insufficient to sustain him or herself, the public sector has the obligation to continue assisting its former worker through various social services.

The public sector must also compete with the private sector for quality workers. Consequently, retirement and other benefit packages are crucial recruitment tools for the public sector. This is especially the case for those public service careers that either: (i) are low paying, at least in relative terms when compared to the private sector, for workers with similar levels of educational attainment, such as teachers; or (ii) involve dangerous activities, such as police, fire fighters and in many cases, social workers, who must deal with difficult and frequently violent situations.

Often, these and other differences between the public and private sectors are glossed over or ignored in the pension debate. The result is overly simplistic criticisms of existing public benefit systems, that: (i) ignore the true causes of and overstate the severity of fiscal imbalances in public pension systems; or (ii) incorrectly assess long term costs to taxpayers and the relative merits of defined benefit versus defined contribution retirement plans for public sector employers and workers alike.

Robert C. Long's recent article, "The Changing Nature of Pension Plans and Retiree Medical Benefits: What the Private Sector Experience Portends for the Looming Crisis in the Public Sector"[5] is a typical example of

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the misinformation clouding the debate on public employee pension benefits. Long contends that the public sector's continued provision of defined benefit pension plans is anachronistic, expensive and noncompetitive, primarily because it ignores the private sector trend to supplant defined benefit systems with defined contribution systems. Long further contends that if the public sector would switch to defined contribution systems, state and local governments will start climbing out from the fiscal problems they experience funding retirement systems.

While the arguments in Long's article have superficial appeal, a closer review of the data reveal that his analysis of and proposed remedies to public pension funding problems are seriously off-point and should not be followed by public sector employers.

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The fundamental flaws in the arguments of commentators like Long include the following, each of which is reviewed at length in this article:

- The private sector's move to defined contribution systems is inapplicable to the public sector, because it occurred predominately among small and midsized, not large employers, and for tax/cost reasons that pertain solely to the private sector.
- Although some public pension systems are significantly underfunded, there in fact is no general, nationwide public pension funding crisis.
- Switching to defined contribution systems will not reduce accrued underfunding in existing public pension systems by one cent.
- Defined contribution systems are more costly for taxpayers than defined benefit systems.
- Defined contribution systems can be expected to provide retirees with inadequate benefits.
- Moving to predominately defined contribution systems will greatly diminish the public sector's ability to attract quality employees.

II. The Private Sector's Move Towards Defined Contribution Systems

For the better part of the 20th century, most employer sponsored retirement plans, both in the private and public sectors, were defined benefit systems.[6] Under a defined benefit system, the employer guarantees an annual retirement payment for a worker that is based on a formula,[7] usually involving such factors as an employee's years of service, age at retirement and either ending salary or average salary over the last few years of service.[8] The annual retirement payment benefit is typically guaranteed for the life of the employee and his or her spouse.[9] These formula-determined retirement benefits are funded from three sources: (i) employee contributions; (ii) employer contributions; and (iii) investment earnings on pension fund assets.[10] All employer and employee contributions and investment returns are pooled, and the assets are collectively managed. The employer maintains responsibility for managing the plan and for ensuring adequate funding is available for payment of benefits when due.[11]

Over the last decade, however, many private sector employers have moved towards defined contribution systems. Defined contribution plans offer no guaranteed benefit on retirement. Instead, they create a retirement savings account for each individual member, such as under a 401(k) plan.[12] The ultimate retirement benefit is the accumulated value of an individual's account available at retirement, resulting from contributions made to the account by the participant and his or her employer, increased by investment earnings and decreased by losses over time.[13] The employee is responsible for investing his or her own retirement account, but must typically pay a third party to administer it.[14] Employees make all decisions about where to invest retirement savings and how much to contribute. It follows that the employee assumes all market and timing risks concerning the assets in an individual defined contribution account. It is therefore possible for an employee to both outlive the accumulated assets in the account, and/or to lose all of it in a turbulent market. Neither of those unfortunate contingencies pertains in a defined benefit setting.

As Long correctly notes, from 1985 to 2002, the number of defined contribution systems implemented in the private sector grew significantly, from 12 million to 52.9 million.[15] By contrast, over the same period the number of public sector defined benefit plans remained relatively stable,[16] with the number of such plans that include 10,000 or more active participants actually increasing by 13 percent.[17] Long and advocates of defined contribution systems point to the aforementioned private sector trend in favor of defined contribution plans as compelling evidence of the undue cost and uncompetitiveness of defined benefit systems, and as the primary reason the public sector should abandon defined benefit systems for defined contribution systems.[18] Certainly, the numbers appear dramatic; however, closer inspection of the private sector's move to defined contribution systems demonstrates that the trend is irrelevant from the public sector's standpoint.

Much of the increased utilization of defined contribution systems in private industry was caused by the passage of the Employment Retirement Income Security Act ("ERISA").[19] ERISA established standards for defined benefit plan participation, vesting, retirement, and reporting; and imposed a tax on defined benefit plans to fund the Pension Benefit Guaranty Corporation ("PBGC").[20] Subsequently, ERISA regulations were made even more stringent through the addition of amendments, particularly the Multiemployer Pension Plan Amendments of 1980, the Tax Equity and Fiscal Responsibility Act of 1982 and the Tax Reform Act of 1986. These changes reduced or eliminated incentives to private sector employers offering defined benefit plans, and increased the liability, expense, or regulatory requirements of maintaining a private sector defined benefit plan.[21]

As a reaction to the imposition of these new standards and costs, many small to midsized private sector businesses moved away from defined benefit systems toward defined contribution systems.[22] However, state and local government pension plans are not subject to most ERISA regulations and amendments.[23] Moreover, public plans are not required to make payments to the PGBC.[24] As a result, the primary factor - ERISA - that pushed the private sector toward defined contribution plans does not even apply to state and local governments. Consequently, the private sector trend, as dramatic as it may be, holds little relevance for government employers.

Interestingly, even after the ERISA motivated shift to defined contribution systems in the private sector, large, private business predominantly continued to use defined benefit systems.[25] Fully 75 percent of the Fortune 500 still use defined benefit plans as their main retirement benefit system.[26] Public sector employers are typically large employers. If large employers in the private sector still favor defined benefit systems despite the added costs and administrative burdens imposed by ERISA, there seems to be no reason for the public sector, which does not have those costs and burdens, to abandon defined benefit systems. This is especially so, given the higher administration costs that defined contribution systems would impose on taxpayers and the public sector's need to attract quality workers, both of which are discussed in more detail below.

III. The Absence of a General Nationwide Public Pension Funding Crisis

One reason commentators like Long push for the public sector to move to defined contribution systems is the frequently cited "crisis" in public system funding.[27] Long, along with others, point to the $700 billion aggregate, combined unfunded liability of all public retirement systems as evidence of a massive, fiscal crisis.[28] However, the gross dollar value of an unfunded liability by itself does not reveal much. To have real meaning, unfunded liability must be compared with the resources available to fund the obligations.[29]

In actuality, "funded ratio" – that is, the percentage of accrued pension liabilities currently funded with pension system assets – provides a much more accurate barometer of the health of public pension systems. According to the Public Fund Survey, the average funded ratio for more than 100 of the nation's largest public plans was 87 percent in 2005, with two thirds of the plans at least 80 percent funded.[30] While a handful of plans are significantly underfunded, with funded ratios below 60 percent, the financial health of plans covering the vast majority of pubic employees are sound.[31]

The Public Fund Survey, like Long, also pegs the aggregate unfunded liability of all public plans at $336 billion.[32] However, according to the United States Federal Reserve, public pension plans as a whole have accumulated $2.7 trillion in assets to pay benefits.[33] Taken together, that means the "massive" $336 billion unfunded liabilities represent only 13 percent of the total liabilities for all the plans surveyed.[34] Pension liabilities are long-term liabilities that are typically amortized over 30 years, similar to a mortgage.[35] In common sense terms, it seems highly unlikely homeowners who had paid 87 percent of their mortgages, with 30 years left to pay the remainder would consider themselves to be in a financial crisis, especially if, like government, their ongoing revenue was guaranteed not only to continue, but increase, over the coming 30-year period.

This is not to say that some

pension plans don't face serious underfunding problems. They do. However, the underfunding has been mainly due to the applicable government employer not making its required contribution, rather than to any intrinsic cost of or problems with defined benefit plans generally. For example, Illinois state government is facing a $40.7 billion dollar unfunded liability in the aggregate for its five public employee systems, the largest in the nation.[36] Illinois' outsized, unfunded liability is not due to overly generous benefits; according to U.S. census data, the average monthly pension payment to state government employees nationally was $1,374 in 2001-2002.[37] At the same time, the average Illinois payment was $1,426, a difference of just 3.7 percent.[38] Nor was it the normal cost of the systems that caused the unfunded liability; the average normal cost nationally, as a percentage of active member payroll, is 12.5 percent, while the weighted average of the normal cost across all five Illinois systems is 9.3 percent, well below average.[39] Of course, public employees in Illinois have paid their required contributions to the plan over time; teachers in Illinois pay 9.4 percent of their salary to the pension system, the highest in the nation.[40] The only weak link, and the true cause of the large unfunded liability in Illinois, is the state's irresponsible decision to underfund its required employer contributions for decades.[41]

IV. Switching to D. C. Systems Will Not Reduce Accrued Under Funding in Public Pension Systems

Even if a government employer is one of the few facing serious unfunded liabilities in its pension system, switching to a defined contribution plan will not reduce its unfunded liability by one red cent. In virtually all instances, pension benefits owed to current and former state and local government employees may not legally be reduced.[42] Since most government pension plans are protected against diminution by state constitution or statutes, switching to a defined contribution plan cannot reduce any unfunded liability accrued under existing defined benefit programs.[43]

At best, switching to a defined contribution plan can apply prospectively, either to new hires that join the public sector workforce after the pension system changes, or to current employees who exercise an option to transfer into a new defined contribution plan going forward.[44] In either case, however, the existing unfunded liability remains intact, and still must be funded dollar for dollar irrespective of the plan change.

V. Moving to D. C. Systems Will Lead to Higher Costs

Although it may not address existing unfunded liability, if moving from a defined benefit to defined contribution system held the promise of saving significant taxpayer expense, while still providing adequate retirement benefits and ensuring quality public sector employees, such a shift should certainly be explored. The problem is defined contribution plans are more costly to establish and maintain than defined benefit plans.[45] First, there are the added start-up costs associated with any new defined contribution plan. It must be designed, vendors must be selected, and its operation must be monitored.[46] In addition, employees must be educated about plan features and available investments, because now the responsibility to make investment decisions rests with the workers, rather than fiduciaries.[47] For example, the budget for Florida's defined contribution plan, which was established in 2000, totaled $89 million from FY 2001 through FY 2004. This included $55 million to educate Florida's 650,000 government employees about the new plan.[48] Staff time is spent throughout the process, and the sponsoring governments must pay additional legal and consulting fees.[49] If a third party administrator is not hired for the plan, the government employer must do this as well. Even if a third party administrator is hired, the government will still have significant operating costs related to the defined contribution plan.[50]

Administrative costs are significantly greater for government employers and taxpayers in a defined contribution than in defined benefit setting.[51] According to the Investment Management Institute, the operating expense ratio for defined benefit plans averages 31 basis points (31 cents per $100 of assets); the average for defined contribution plans is three to six times higher at 96 to 175 basis points.[52] To put that in context of the Illinois pension systems, the administrative costs of a defined contribution system would in all likelihood be anywhere from $265 million to $586 million more expensive annually than the state's current defined benefit systems.

In the mid 1960's, Nebraska switched from a defined benefit to a defined contribution plan for state and county government employees. Immediately, that state noted it was paying higher administrative costs for its new, defined contribution system.[53] Over time, Nebraska found that, when compared to its defined benefit plan, the new defined contribution plan cost the state significantly more in investment management fess, record-keeping fees, educational programs and other administrative line items.[54] In 1999, Nebraska’s administrative expenses for its defined contribution plans were double the costs of its defined benefit plans.[55]

There is also a potentially significant indirect cost for taxpayers to bear when shifting to a defined contribution plan, that involves normal cost and investment returns. The "normal cost" of a pension system is the contribution required from an employer to fund the plan's benefits. In a defined contribution setting, the normal cost is simply what percentage of a worker's pay the government employer has promised to contribute to that worker's retirement account, together with any match. In a defined benefit setting, however, normal cost is the annual percentage of total payroll a government employer must contribute to fund the promised benefit for its current workforce, based on actuarial tables. This contribution can be funded from a combination of tax revenue and investment returns earned on plan assets, if the returns are high enough to cover anticipated benefits, plus a portion of the employer's current normal cost contribution. In the defined contribution setting, investment returns belong solely to the employee who makes the investment in his or her retirement account, and are not available to reduce the employer contribution.[56] Frequently, fully-funded defined benefit plans attain high enough investment returns that public sector employers are able to reduce the amount of normal cost paid from tax collections, freeing taxpayer revenue to cover services.[57] This cost savings can be significant, as the experience of the Illinois Municipal Retirement Fund (IMRF) demonstrates.

The IMRF, the second largest pension fund in Illinois covering public employees such as bus drivers, sewer workers and municipal administrators, has enjoyed a funding advantage for years, in large part because it has relentlessly demanded full and on time payments from member government employers and employees.[58] As a result, the IMRF has consistently maintained high levels of funding.[59] As of December 31, 2006, IMRF was 100.5 percent funded on an actuarial basis.[60] Because of this, government employers within the IMRF will enjoy lower contribution rates in 2007.[61] Rates will fall from an average 10.04 percent in 2006 to 9.72 percent this year, saving taxpayers millions.[62]

The data show simply maintaining a well-funded defined benefit system can save significant taxpayer dollars over time. It is unclear why proponents of defined contribution systems are so eager to impose additional costs on taxpayers — especially when, as analyzed below, the benefits generated for workers will be lower.

VI. D. C. Systems Provide Inadequate Benefits

A switch to a defined contribution system bears negative implications for not only employers and taxpayers, but also workers. The Center for Retirement Research at Boston College ("CRR") found that in 2001, the average 401(k)/IRA account balance of individuals nearing retirement (ages 55-64) was $42,000, whereas CRR's modeling indicated that a regular middle-income contributor should have accumulated almost $300,000 by that age.[63] If a worker retires at 65 years of age, and lives until 85 with only $42,000 in retirement savings, that would leave just $175 per month or $2,100 per year, to cover costs for the remainder of his or her life, not nearly enough on which to survive.[64] At the same time, the average state and local government employee defined benefit is $1,374 per month or $16,488 per year,[65] hardly abundant, especially considering 28 percent of state and local government employees are not eligible to receive Social Security.[66]

There are multiple reasons balances available at retirement under a defined contribution plan are so low. Unlike defined benefit plans, participation is not mandatory under a defined contribution plan.[67] Studies show 25 percent of employees choose not to participate at all in 401(k) defined contribution programs when offered, leaving them with no private savings.[68] In addition, CRR found that less than 10 percent of workers with defined contribution plans actually contribute the maximum allowed.[69]

Inexperience and lack of investment training also contribute to low account balances. The state of Nebraska found that when employees managed their own investments under that state's defined contribution plan, investment returns were lower than under the state's defined benefit system.[70] From 1983 to 1999, Nebraska state and county workers averaged a 6 percent return when investing their individual retirement accounts in that state's defined contribution plan, versus the 11 percent return for teachers and judges under Nebraska's defined benefit plan.[71] The actual investment differential in favor of the defined benefit system becomes even greater once the lower administrative costs of the defined benefit system are factored in.[72] One key reason public defined contribution plan returns lag defined benefit portfolios is simple, asset allocations made by employees in a defined contribution setting are often quite conservative.[73] Again, the Nebraska experience is illustrative. Despite state education programs on the importance of proper asset allocation and eleven different investment options, 90 percent of Nebraska's employees invested all their individual plan deposits in just three of the eleven available fund choices.[74] This suggests employees lack the proper skills to diversify their assets and make sound investments. Under a defined benefit system, experienced portfolio managers invest plan assets under carefully considered asset allocation models geared toward long term returns.

Anna Sullivan, the director of Nebraska's Public Employees Retirement System observed that members were making decisions based on emotions and trying to time the market by chasing returns.[75] In the end the majority of them were left with barely anything to live on following retirement.

The bottom line was clear, Nebraska found that ten years after retirement, a retiree in that state's defined contribution plan with 30 years of service and an average annual salary of $30,000, had about $11,230 annually in retirement benefits,[76] which is $2,460 less than the poverty level for a family of two. Participants in Nebraska's defined benefit plan with similar pay and service credit, however, had an annual retirement benefit of $16,797,[77] which is $3,100 more than the poverty level for a family of two.

Faced with irrefutable data illustrating that defined contribution systems provide lower benefits for employees at higher costs to taxpayers, Nebraska legislators changed back to a defined benefit model in 2002.[78] This effectively ended the state's defined contribution plan for new hires, while giving all other workers the option to switch into a hybrid plan. "We had to take a look in the mirror and think, is this really providing a true pension?" said Sullivan. "It's really sad what they retire with. It's nothing compared to what people in our defined benefit plan receive."[79] Sullivan sums up Nebraska's experience by stating, "Our experience with the defined contribution plan has been mixed. We have had over 35 years to 'test' this experiment and find generally that our defined contribution plan members retire with lower benefits than their defined benefit plan counterparts."[80] While the chief purpose of employer sponsored retirement benefits is not to make workers rich, it is to at least promote retirement security, something the data show a defined contribution system generally fails to accomplish.

VII. D. C. Systems Diminish the Public Sector's Ability to Attract Quality Employees

In addition to retirement security, employer sponsored pension benefits have long been part of the overall compensation package used to attract and retain qualified employees.[81] Eliminating defined benefit plans from compensation packages would diminish the public sector's ability to compete with the private sector in obtaining and retaining quality workers.

Since the public sector generally does not pay salaries competitive with the private sector for similar levels of credentials, a defined benefit plan is an effective tool for recruiting and retaining high quality civil servants, many of whom are in typically lower paid but vital and high risk jobs.[82] These workers fight fires, protect our streets, educate our children and provide medical care. Certainly, it is in the public interest to attract workers with a high level of skill to fill these and other positions. Decent pension benefits can create an especially important recruitment advantage for the public sector today, as the private sector continues to reduce benefits over time.[83] Long ignores this reality by relying on faulty reports that indicate public sector workers are relatively highly compensated[84] — a conclusion that can only be reached when data is manipulated to exclude the level of credentialing attained.[85] This is both disingenuous and counterproductive.

Demographic changes, particularly the aging of the workforce, are making pension benefits an even more crucial tool for attracting quality workers than in the past. In a recent study, Deloitte Consulting ("Deloitte") identified significant workforce shortages that will materialize in the labor market due to the aging population. Deloitte found that, because more than 10,000 baby boomers are now turning 55 years old every day, for the first time in history, the number of workers entering the labor market will not replace those that are leaving.[86] Deloitte projects that the number of workers age 25 to 34 will shrink by almost 9 percent from 2006 to 2016, leading to a total labor shortage of 10 million by 2010, and 35 million by 2030.[87]

In addition to a general labor shortage, there looms a significant skills shortage, as revealed by the decrease in university graduation rates. From 1998 through 2002, graduation rates at public universities fell by 7 percent.[88] By 2012, it is expected that employers will need 6 million more four-year degree candidates to fill jobs than will be available in the labor market.[89] In short, as baby boomers retire, much of the future workforce is anticipated to lack the skills and education necessary to fill the vacated positions.[90] As a result of this national talent shortfall, there will be heightened competition between the public and the private sectors to attract qualified candidates. This will require government employers to offer either higher salaries or better benefit packages than in the past to attract and keep talented workers. Conversely, if the public sector were to scale back pension benefits or follow the private sector trend to utilize defined contribution plans, government employers may find themselves at a significant competitive disadvantage to the private sector in attracting qualified and skilled workers, leading to a decline in quality of public services.

Moreover, a majority of public sector positions are best served when those who occupy them are career oriented or at least remain in them for ten years or longer.[91] Two-thirds of public employees are classified by the United States Census Bureau as judicial, firefighters, police officers and support, corrections, or educational.[92] It is only common sense that the taxpaying public benefits when individuals remain in these positions for an extended period - long enough to enable the employer and taxpayers to realize a return on the investment made to train the employee to serve the public in these difficult tasks. Moreover, taxpayers are well served when public sector positions are filled with skilled and qualified personnel, rather than inexperienced workers who are learning on the job. Retention of qualified workers is a primary reason that public sector employers continue to offer defined benefit plans – these benefits create an incentive for career oriented workers to remain in their positions.[93]

In that regard, several states which previously switched to defined contribution plans reverted back to defined benefit plans. Even North Dakota, which originally established its pension system as a defined contribution model, changed to a defined benefit system specifically because of the need to attract and retain quality employees.[94] In May 2005, West Virginia passed legislation to allow teachers under that state's defined contribution plan to transfer into a defined benefit plan.[95] State representatives said the change would help prevent teachers from leaving their jobs.[96]

The data clearly indicate that provision of decent retirement benefits is an essential element in the public sector's ability to recruit and retain employees in important and high-risk occupations. In the absence of offering decent benefit plans to remain competitive with the private sector, public employers will be required to make adjustments in compensation packages offered. Such adjustments might include improved working conditions, other benefits, or higher pay. It is unrealistic to think that the behavior of current and future public employees will not change if their compensation packages are significantly diminished.

VIII. Conclusion

Commentators like Robert C. Long have a clear belief the public sector is making an anachronistic, fiscally unsound and noncompetitive mistake by offering defined benefit retirement plans to workers. Under their line of thinking, state and local governments ought to eschew this expensive approach to retirement security, and move public employee pension systems to the defined contribution model. Yet, a thorough review of the data reveal that this argument relies on selective use of statistics, designed more to scare and misinform than illuminate.

Want to scare decision makers and voters? Point out that the aggregate unfunded liability across all state and local pension plans exceeds the eye-opening sum of $366 billion. That will get attention. Just make sure you fail to point out that these same pension funds have nearly $2.7 trillion in assets, making them over 87 percent funded. Why provide needed context to evaluate pension fiscal capacity honestly, when you can manipulate a statistic out of context to push your preconceived conclusion?

Better yet, argue that defined benefit systems are not competitive in the private market place. Everyone likes competitive practices. For this argument to sound plausible, however, you have to neglect mentioning that the reason many small and midsized businesses moved to defined contribution systems, ERISA, does not apply to the public sector. You also have to ignore the fact that most large private employers have kept defined benefit plants, and that government is a large employer. To really make this argument framed around "competitiveness" stick, you have to fail to mention that the public sector competes with the private sector for workers, that it pays less salary than the private sector does to workers with similar qualifications, that Deloitte has noted the nation has a growing shortage of skilled workers available, and that providing defined benefit pension plans is a key compensation element used by the public sector to compete with the private sector for workers.

Next, claim defined benefit systems are too expensive for taxpayers, because everyone wants to reduce taxpayer costs. Never mind that administrative costs under defined contribution systems are three to six times higher than under defined benefit systems. And just what do taxpayers get for paying higher costs? Lower benefits for workers. Those states that have extensive experience with switching to a defined contribution system, like Nebraska, found the average annual retirement benefit former workers received was below the federal poverty level.

It is time to stop misleading voters and decision makers on the reality of the state of the public employee pension system in the United States. Public pension funds provide a regular stream of retirement income for nearly seven million workers. In doing so, these systems contribute to the economy and retirement security of a large segment of the nation's aging population. With nearly $3 trillion in assets, these funds will continue to do so unless they are undermined by policy makers relying on flawed and misleading information. ♦

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Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes.

IELRA Developments

Arbitration

In Belleville Federation of Teachers, Local 434 v. Belleville Township High School District 201, Case No. 2007-CA-0044-S (IELRB 2007), the IELRB granted the Federation's request to seek preliminary injunctive relief that prevented the district from refusing to comply with an arbitration award. The arbitration involved a teacher's aide who worked in a class that consisted of educable mentally handicapped students. In February 2006, the aide distributed to the students a flyer with the address of a website that the aide maintained. The teacher of the class and other district staff accessed the website that same day and discovered that the site contained a link to pornographic images, although most of the website was devoted to professional wrestling. The aide removed the pornographic link shortly thereafter.

The arbitrator found that there was no evidence that any student actually accessed the website, and he concluded that, in the absence of any damages to the students, faculty, or school, the aide's misconduct was a remediable offense. However, the arbitrator did find that the aide engaged in serious misconduct so the aide was not entitled to any back pay or benefits but should have been reinstated no later than April 30, 2007. The district acknowledged it did not comply with the award by reinstating the aide by this date, so the union sought the preliminary injunction from the IELRB.

The district argued that the award was not binding on the basis that it violated public policy. Although awards that conflict with public policy may not be enforceable under *AFSCME* v. *State*, 124 Ill. 2d 246, 529 N.E.2d 534 (1988), the IELRB noted that this exception is very narrow. The IELRB employed a two-step analysis to determine (1) whether there was a well-defined and dominant public policy at issue, and (2) whether the arbitrator's award violated this public policy. The IELRB determined that there was a well-defined public policy against distributing pornography to minors so the issue was solely whether the arbitrator's award violated this policy. The IELRB determined, "The question . . . is not whether an individual's conduct violates public policy, but whether his/her reinstatement does so." Since the arbitrator's award allowed the aide to be suspended for over one year without back pay or benefits for his conduct, the IELRB believed that the award did not condone the conduct. In addition, the arbitrator considered the aide amenable to discipline since he removed the link on his website to pornographic materials quickly after the events occurred. Thus, the Board found a significant likelihood that the district would not be able to show that the reinstatement violated public policy. The district's refusal to reinstate the aide since April 30, 2007, constituted irreparable harm because it was a continuing transgression and it may have created a chilling effect on other employees who seek to file grievances against the district. Therefore, preliminary injunctive relief was just and proper.

Arbitration

In *Peoria Federation of Teachers, Local 780, IFT/AFT and Peoria School District 150*, Case No. 2006-CA-0026-S (IELRB 2007), the IELRB affirmed the Administrative Law Judge's determination that Peoria School District 150 violated Section 14(a)(8), and 14(a)(1) of the IELRA by refusing to comply with an arbitration award. The arbitration award was entered in favor of a teacher who was terminated at the end of her third year. The arbitrator found that the district failed to comply with its Evaluation Handbook. The award did not require reinstatement but required the school district to make a monetary payment to the teacher of up to $10,400.

The IELRB noted that whether an arbitration award is binding depends upon a variety of factors. These factors include whether the award was issued according to the applicable grievance procedure, whether the procedures were impartial and fair, whether the award conflicts with other statutes, and whether the award is repugnant to the purposes of the IELRA. Here the school district argued that the award conflicted with another statute - the School Code. In particular, the school district argued that it had the power under the School Code to terminate a probationary teacher for poor performance and that its powers under the School Code superseded the collective bargaining agreement.

The IELRB determined that the arbitrator's award did not conflict with the School Code because it did not disrupt the school district's ability to dismiss probationary teachers. Rather, the arbitrator's award was based upon her determination that the school district was required to comply with the procedures set forth in its Evaluation Handbook. Moreover, the award did not require the teacher to be reinstated, but only required a monetary payment. Consequently, because it did not preclude the district from dismissing the probationary teacher.

IPLRA Developments

Duty to Bargain

In *Int'l Union of Operating Engineers, Local 150 and Village of Lisle*, S-CA-05-043 (ILRB State Panel 2007), the International Union of Operating Engineers challenged the administrative law judge's recommended decision and order. The ALJ dismissed the union's allegations that the Village of Lisle violated of the IPLRA, by not giving members of the bargaining unit an "equity" increase. The State Panel reversed.

In January 2004 the union was certified as the representatives of a bargaining unit of sixteen village workers. In May of 2004 the village granted a pay raise of 4 percent to all employees including those of the newly certified bargaining unit. In addition, the village granted all of its unrepresented employees another 3 percent "equity" raise, but did not grant the union workers a 3 percent raise. The union argued that its members should have received this raise as well.

If the ALJ found that the May 2004 3 percent increase was not an established practice and, thus, the union members were not entitled to it. The State Panel agreed that prior equity raises were sporadic and granted to individuals rather than across the board. However, the State Panel found that the increases in question were different because the increase was given in a uniform amount and because the recipients were all unrepresented village employees. Additionally the village did not state a reason for departing from the way it had given these equity raises in the past. Consequently, the State Panel held, the 3 percent raises were actually merit raises, their award was part of the status quo and the village was obligated to maintain the status quo during negotiations and extent the raises to the bargaining unit. Futhermore, the State Panel found that the reason the bargaining unit employees did not receive the raise was because they had exercised their rights to organize.

Supervisors

In *Metropolitan Alliance of Police, Burr Ridge Command Chapter No. 13 and Village of Burr Ridge*, Case No. S-RC-05-109 (ILRB State Panel 2007) the State Panel held that corporals and sergeants in the Village of Burr Ridge police department are not prohibited from organizing under the IPLRA's supervisory exclusion. Section 3(r) of the Act states that a 'supervisor is an employee whose principal work is substantially different from that of his subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote . . ., if the exercise of such authority is not of a merely routine or clerical nature, but requires independent judgment . . . ."

The State Panel agreed with its ALJ's finding that the corporals were not supervisors because their principal work was indistinguishable from that of subordinate patrol officers. However, the State Panel reversed the ALJ and held that the sergeants were not "supervisors," because their work was also indistinguishable from that of their subordinates. Although sergeants had day-to-day oversight accompanied by the authority to evaluate their subordinates, such evaluation was separately reviewed and approved by department heads. Thus, because sergeants had little discretionary authority in this review process, they were not supervisors under the Act.

The State Panel also held that the sergeants were not supervisors because they lacked the authority to grant grievances, even though they were the first step in the grievance procedure. Instead, sergeants merely chose between two or more significant courses of action, which did not require the use of independent judgment.

Weingarten Rights

Eppley v. Department of Central Management Services

In *Eppley and State of Illinois, Department of Central Management Services* (*Environmental Protection Agency*), No. S-CA-06-0 (ILRB State Panel 2007) the State Panel held that the Environmental Protection Agency (EPA) did not violate Eppley's *Weingarten* rights by refusing to allow another employee to accomany Eppley to a pre-disciplinary hearing.

Eppley sent an e-mail to union officials, with blind copies to a number of other individuals, expressing dissatisfaction with the union. As a result, several co-workers filed complaints against the EPA, and in turn, the EPA scheduled a pre-disciplinary hearing with Eppley to review this e-mail. Eppley attempted to bring a co-worker into the meeting, but instead he was only allowed to bring a union steward. Eppley filed an unfair labor practice charge as a result. Eppley was eventually discharged and then reinstated with back pay after he appealed to the Illinois Civil Service Commission.

The State Panel explained that a public employee has the right to union representation at a meeting when: 1) the meeting between the employee and his or her supervisors is investigatory; 2) the employee reasonably believes that disciplinary action may result; and 3) the employee requests a union representative. Here, the co-worker Eppley wanted in the meeting was not a union representative, and Eppley did have a union representative at the meeting. Thus, the EPA did not violate the Act when it did not allow the co-worker in the pre-disciplinary meeting. ♦

Further References

(compiled by Yoo-Seong Song, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

LaVan, Helen. PUBLIC SECTOR EMPLOYEE DISCIPLINE: COMPARING POLICE TO OTHER PUBLIC SECTOR *EMPLOYEES. EMPLOYEE RESPONSIBILITIES AND RIGHTS JOURNAL*. Vol. 19, Iss. 1. pp. 17-30.

The goal of this article is to investigate a general belief that police force discipline is more lenient than that of other public sector employees. While police discipline involves a complex process and typically more time-consuming than other discipline, there has not been much research in the area of police force management. The author analyzes about 200 cases that went to arbitration and draws a conclusion that police discipline is not much distinctive from non-police employee discipline. The author writes that among the cases, no clear differences are found between police and non-police employee discipline in terms of case characteristics, case outcomes, and arbitrator behaviors.

Rubinstein, Mitchell H. ASSIGNMENT OF LABOR ARBITRATION. *ST. JOHN'S LAW REVIEW*. Vol. 81, Iss. 1. pp. 41-76

The author of this article suggests assigning the right to proceed with the arbitration to the grievant, as a way of reducing hostility and further litigation. The author describes several reasons that may have affected unions from doing so; however, this article suggests that there are certain cases in which assignment of labor arbitration to the grievant will lead to greater satisfaction for the grievant, unions, and employers. The author hopes that this article will stimulate further discussion and development on this issue.

(Books and articles anotated in Further References are available on interlibary loan through ILLINET by contacting your local public library or system headquarters.)

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